Nikmat Maju Development Sdn Bhd v Tenaga Nasional Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-949–04 OF 2013
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND ABANG ISKANDAR JJCA
13 JANUARY 2015

B

Civil Procedure — Pleadings — Failure to plead — Material facts — Claim by Tenaga Nasional Bhd for loss of revenue due to meter tampering — Defence regarding unreasonableness of method of calculation not expressly pleaded — No objection raised during cross-examination of witnesses — Justice of case to be countervailing factor — No element of surprise or unfairness occasioned

C

D

Public Utilities — Electricity — Charges for electricity — Recovery of unbilled usage of electricity — Electric meter room under control of Tenaga Nasional Bhd ('TNB') — Remote monitoring showing suspicious discrepancies in electricity usage — Meter tampered resulting in under-recording of usage of electricity — Claim by TNB for loss of revenue — Failure of TNB to prove tampering by appellant — Undue delay by TNB in pursuing claim — Whether TNB estopped from claiming — Whether charging the appellant for an offence under the Electricity Supply Act 1990 is a pre condition to TNB's right to claim loss of revenue — Whether method of calculation unreasonable — Whether presumption under s 38(4) displaced by available evidence

E

F

Tort — Defamation — Notice of demand — Whether notices of demand sent by Tenaga Nasional Bhd threatening to discontinue electricity supply were defamatory — Demand letters in pursuit of a legal right

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The appellant operated the Crystal Crown Hotel ('Hotel') in Petaling Jaya, and was a registered consumer of the respondent, which supplied the electricity to operate the hotel. The installation of the electric meter (the TNB meter room) was within the premises of the hotel but under the control of the respondent and secured by lock and key held in the possession of the respondent. The respondent had conducted a remote monitoring of the meter over a span of more than a year by which it discovered suspicious discrepancies in the usage of electricity at the hotel. A physical inspection of the meter installation on 17 July 2008 showed that the meter had been tampered. According to the respondent, the tampering resulted in an under-recording or an error rate of -32.44% as against the actual usage of electricity by the hotel. Several notices were sent to the appellant informing it of the tampering and requiring the

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appellant to pay RM637,697.62 being the amount which should have been paid between October 2006 and July 2008 (22 months) had the supply been correctly recorded. The appellant refused to pay resulting in the respondent filing a civil suit to recover the loss of revenue. The appellant contended that: (a) the respondent was estopped from making the claim because it had care and custody of the TNB meter room which was kept under lock and key by its employee and if there were any inaccuracies in the meter readings, these would have been capable of detection during their monthly visits to issue the electricity bills and during its annual shutdown to carry out maintenance work; (b) the appellant had not been charged for any offence under the Electricity Supply Act 1990 ('the Act') which was argued to be a pre condition to the respondent's right to claim the loss of revenue; and (c) the method of calculation was unreasonable, on the grounds that the back billing had to be based on the actual number of days which showed an undercharge and not on the basis of every day of electricity consumption from 1 October 2006 to 1 July 2008. The appellant also counterclaimed for damages for defamation arising from the several letters that the respondent had sent to the appellant in the course of the threat to discontinue the supply of electricity and the demand that the appellant settle the sum claimed for the 22 months of alleged underbilling. The learned High Court judge allowed the respondent's claim but dismissed the appellant's counterclaim and hence the present appeal against the decision of the High Court.

Held, allowing the appeal on the main claim and dismissing the appeal on the counterclaim with cost:

(1) The evidence and the applicable law did not support a claim for breach of statutory duty or defamation, quite aside from the argument that breach of statutory duty was not pleaded. The respondent was merely exercising its powers under s 38 of the Act in a situation where there was evidence of tampering of the TNB meter. The respondent's letters were in essence demand letters in pursuit of a legal right, and therefore could not be defamatory. The position taken by the respondent was not so much that the appellant was the culprit who tampered with the meter, but more on the basis that in such circumstances it was entitled statutorily to claim for loss of revenue in its capacity as a utility company since the tampering benefited the appellant (see paras 20–21).

(2) A prosecution and conviction for a criminal offence is not a precondition for a civil action for recovery of loss of revenue under s 38(3) of the Act. A prior prosecution and conviction under s 37 is not a precondition to a loss of revenue claim under s 38 (see paras 22 & 26).

(3) The burden of proof on the civil standard lay on the plaintiff. There had to be evidence of tampering to serve as a foundation of the loss of revenue claim. The evidence indicated that the TNB meter room was just outside

the hotel's main building (next to the Lobby area) and it was kept under lock and key, with the key for access being kept by the respondent. It was not established on the evidence that any of the employees of the Hotel had access, or could have had access, to the meter room (see paras 26–27).

(4) It was patently unfair to bill the undercharged consumption on a monthly basis and not actual days for 22 months to arrive at the huge figure of RM637,697.62. Most businesses will be crippled by this sort of calculation, which, on any proper evaluation of the facts must be regarded as an unreasonable calculation of the quantum of damages. The respondent had not proven its quantum of damages on a balance of probabilities (see para 30).

(5) The findings of the High Court could not be supported. There was sufficient evidence on which to raise an estoppel. The appellant was led to believe over that lengthy period of 22 months that everything was in order only to be later billed for more than half a million Ringgit for the alleged under billing. The respondent, by its own admission, had a sophisticated system of remote monitoring and yet it chose not to act promptly and remedy the alleged defects in the metering system. It would be unfair to impose liability on the customer by reason of the respondent's own lack of sense of immediacy. Further, the method of calculating the back billing was erroneous since the same sophisticated monitoring system could calculate the exact loss of revenue on a daily basis, and it was admitted by the respondent's witnesses that the discrepancies occurred for only several days in a month (see para 33).

(6) The presumption under s 38(4) of the Act whereby a written statement by an employee of the respondent specifying the amount of the loss of revenue and the person liable for the payment 'shall be prima facie evidence' of the payment due, was easily displaced on the available evidence (see para 33).

(7) The High Court also rejected the argument on the unreasonableness of the calculation partly because it was not expressly pleaded. However, the notes of evidence did not show that any objection on this score was raised when the witnesses were being cross-examined on this issue. In any event, the justice of the case should be a countervailing factor particularly when the High Court itself dealt with issue in some detail only to reject the argument ultimately. There was no element of surprise or unfairness occasioned to the respondent by the inclusion of this additional ground (see para 34).

[Bahasa Malaysia summary

Perayu mengoperasikan Hotel Crystal Crown (hotel) di Petaling Jaya, dan merupakan pengguna berdaftar kepada responden, yang mana membekalkan elektrik untuk mengoperasikan hotel. Pemasangan meter elektrik (bilik meter

TNB) adalah di dalam premis hotel tetapi di bawah kawalan responden dan dikunci dan kuncinya dipegang dalam milikan responden. Responden telah menjalankan pemantauan jarak jauh meter selama tempoh lebih daripada satu tahun di mana ia mendapati perbezaan yang mencurigakan dalam penggunaan elektrik di hotel. Pemeriksaan fizikal pemasangan meter pada 17 Julai 2008 menunjukkan bahawa meter itu telah diusik. Menurut responden, usikan mengakibatkan rekod di bawah atau kadar kesilapan -32,44% berbanding penggunaan sebenar elektrik oleh hotel itu. Beberapa notis dihantar kepada perayu memaklumkan usikan dan mengkehendaki perayu membayar RM637,697.62 menjadi amaun yang mana sepatutnya dibayar antara Oktober 2006 dan Julai 2008 (22 bulan) sekiranya bekalan direkodkan secara betul. Perayu enggan membayar mengakibatkan responden memfailkan guaman sivil untuk memdapatkan kembali kerugian pendapatan. Perayu menghujahkan bahawa: (a) responden diestop daripada membuat tuntutan kerana ia mempunyai jagaan dan kawalan bilik meter TNB yang mana dikunci dan kuncinya dipegang oleh pekerjanya dan jika terdapat apa-apa ketidaktepatan dalam bacaan meter, ini sepatutnya mampu dikesan semasa lawatan bulanan mereka untuk mengeluarkan bil elektrik dan semasa penutupan tahunan untuk menjalankan kerja-kerja penyelenggaraan; (b) perayu tidak pernah disabitkan dengan apa-apa kesalahan di bawah Akta Bekalan Elektrik 1990 ('Akta') yang dihujahkan untuk menjadi pra syarat untuk hak responden menuntut kehilangan hasil; dan (c) kaedah pengiraan adalah tidak munasabah, dengan alasan bahawa bil kebelakang perlu berdasarkan bilangan sebenar hari yang menunjukkan caj kurang daripada harganya dan bukan atas dasar penggunaan elektrik setiap hari dari 1 Oktober 2006 hingga 1 Julai 2008. Perayu juga menuntut balas bagi ganti rugi kerana fitnah yang timbul daripada beberapa surat yang telah dihantar oleh responden kepada perayu dalam mengugut untuk menghentikan bekalan elektrik dan permintaan bahawa perayu untuk menyelesaikan jumlah yang dituntut untuk 22 bulan dikatakan di caj kurang daripada bil. Hakim Mahkamah Tinggi bijaksana membenarkan tuntutan responden tetapi menolak tuntutan balas perayu dan dengan itu rayuan ini terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan dan tuntutan utama dan menolak tuntutan balas dengan kos:

(1) Keterangan dan undang-undang yang terpakai tidak menyokong tuntutan pelanggaran kewajipan statutori atau fitnah, juga selain dari hujah bahawa pelanggaran kewajipan statutori tidak diplidkan. Responden hanyalah menjalankan kuasanya di bawah s 38 Akta dalam situasi yang mana terdapat keterangan usikan meter TNB. Surat responden berada dalam surat permintaan inti pati dalam usaha mendapatkan hak undang-undang, dan oleh itu tidak boleh menjadi fitnah. Kedudukan yang diambil oleh responden tidak begitu banyak bahawa perayu adalah pelaku yang mengusik meter, tetapi lebih atas

dasar bahawa dalam keadaan seperti itu, ia berhak mengikut undang-undang untuk menuntut kehilangan hasil dalam kapasitinya sebagai syarikat utiliti memandangkan usikan memanfaat perayu (lihat perenggan 20–21).

(2) Sesuatu pendakwaan dan sabitan bagi kesalahan jenayah bukanlah pra syarat untuk tindakan sivil untuk mendapatkan kembali kehilangan hasil di bawah s 38 (3) Akta tersebut. Pendakwaan sebelum dan sabitan di bawah s 37 bukan satu prasyarat untuk tuntutan kerugian hasil di bawah s 38 (lihat perenggan 22 & 26).

(3) Beban membuktikan pada standard sivil diletakkan ke atas plaintif. Perlu ada keterangan usikan untuk disandarkan sebagai asas kehilangan tuntutan hasil. Keterangan itu menunjukkan bahawa bilik meter TNB adalah hanya di luar bangunan utama hotel (bersebelahan kawasan lobi) dan ia disimpan terkunci dengan kunci untuk akses yang disimpan oleh responden. Ia tidak membuktikan pada keterangan bahawa mana-mana kakitangan hotel mempunyai akses, atau mungkin mempunyai akses, ke bilik meter (lihat perenggan 26–27).

(4) Ia adalah terang-terang tidak adil untuk bil penggunaan yang terkurang pada setiap bulan dan bukan hari sebenar selama 22 bulan untuk mencapai angka yang besar RM637,697.62. Kebanyakan perniagaan akan lumpuh oleh pengiraan seperti ini, yang, atas apa-apa penilaian yang betul mengenai fakta pengiraan kuantum ganti rugi yang mesti dianggap sebagai tidak munasabah. Responden telah membuktikan kuantum ganti ruginya atas imbangan kebarangkalian (lihat perenggan 30).

(5) Dapatan Mahkamah Tinggi tidak boleh disokong. Terdapat keterangan yang mencukupi yang boleh membangkitkan estopel. Perayu telah dibuat untuk mempercayai bahawa tempoh panjamg selama 22 bulan bahawa semuanya dalam keadaan teratur hanya mendapati kemudiannya telah dibilkan lebih daripada setengah juta Ringgit yang didakwa di bawah bil tersebut. Responden, dengan akuannya sendiri, mempunyai sistem pemantauan jarak jauh yang canggih tetapi memilih untuk tidak bertindak segera dan meremedikan kecacatan dalam sistem meter. Ia adalah tidak adil untuk mengenakan liabiliti ke atas pelanggan dengan sebab kekurangan responden untuk bertindak segera. Tambahan lagi, kaedah pengiraan bil ke belakang adalah salah memandangkan sistem pemantauan canggih yang sama boleh mengira kehilangan hasil yang tepat pada setiap hari, dan adalah diakui oleh saksi responden bahawa percanggahan yang berlaku hanyalah untuk beberapa hari dalam sebulan (lihat perenggan 33).

(6) Anggapan di bawah s 38(4) Akta yang mana satu kenyataan bertulis oleh seorang pekerja responden yang membutirkan amaun kehilangan hasil

dan orang yang bertanggungjawab untuk pembayaran 'shall be prima facie evidence' terhadap bayaran tertunggak, adalah dengan mudah dialihkan daripada keterangan yang ada (lihat perenggan 33).

(7) Mahkamah Tinggi juga menolak hujah yang tidak munasabah ke atas pengiraan sebahagiannya kerana ia tidak diplidkan nyata. Walau bagaimanapun, nota keterangan tidak menunjukkan bahawa apa-apa bantahan telah dibangkitkan kepada skor ini apabila saksi disoal balas mengenai isu ini. Dalam apa jua keadaan, keadilan kes itu harus menjadi faktor timbal balas terutamanya apabila Mahkamah Tinggi sendiri menangani isu dengan terperinci hanya untuk menolak hujah akhirnya. Tidak ada unsur kejutan atau ketidakadilan yang berlaku kepada responden oleh kemasukan alasan tambahan ini (lihat perenggan 34).]]]]]]

Notes

For cases on failure to plead, see 2 *Mallal's Digest* (5th Ed, 2015) paras 7043–7050.

For cases on charges for electricity, see 10 *Mallal's Digest* (5th Ed, 2015) paras 2342–2363.

Cases referred to

Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd [2007] 1 MLJ 217; [2006] 4 CLJ 892, CA (refd)

Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd [2014] 6 MLJ 461, CA (refd)

Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd [2014] 4 CLJ 323, CA (refd)

Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd [2012] 3 MLJ 705; [2012] 3 AMR 576, HC (refd)

Tenaga Nasional Bhd v Takatronics (M) Sdn Bhd & Ors [2010] MLJU 1727; [2010] 1 LNS 1559, HC (refd)

Tenaga Nasional Bhd v EE-Lian Plastic Industries (M) Sdn Bhd [2013] 8 MLJ 683; [2013] 2 CLJ 697, HC (refd)

Tun Datuk Patinggi Haji Abdul-Rahman Ya' Kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)

WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

Legislation referred to

Electricity Supply Act 1990 ss 37, 37(1), (3), (14), 38, 38(1), (3), (4)
Supply Regulations 1990 reg 11(2)

Appeal from: Civil Suit No 22NCC-416–03 of 2012 (High Court, Kuala Lumpur)

K Lopez (Kamarudin & Partners) for the appellant.

Ashmadi bin Othman (Anis Eznin Ishak with him) (Che Mokhtar & Ling) for the respondent.

Mohamad Ariff JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant, Nikmat Maju Development Sdn Bhd operates the Crystal Crown Hotel ('the hotel') in Petaling Jaya, Selangor, and was at all material times a registered user and consumer of the respondent, Tenaga Nasional Bhd, which supplied the electricity to operate the hotel. It was common ground that the installation of the electric meter ('the TNB meter room') was within the premises of the hotel but under the control of the respondent and secured by lock and key held in the possession of the respondent.

[2] The respondent had conducted a remote monitoring of the meter over a span of more than a year by which it discovered suspicious discrepancies in the usage of electricity at the hotel. This led to a physical inspection of the meter installation on 17 July 2008 by the respondent's investigation team. The meter was found to have been tampered with as follows:

(a) the sticker placed on the 'carrier fuse' was torn;

(b) the seal bit was a fake;

(c) the circuit of the red phase on the main meter and the inspection meter was blown; and

(d) the wiring on the circuit was disturbed.

[3] The inspection was conducted with the presence of the appellant's representative, 'DW2' (Azman bin Yusof). The meter was then corrected. The under-recording ceased thereafter.

[4] According to the respondent, the tampering resulted in an under-recording or an error rate of -32.44% as against the actual usage of electricity by the hotel.

[5] Notices dated 18 November 2008, 13 February 2009, 3 April 2009 and 2 May 2009 were sent to the appellant informing it of the tampering of the recording of the supply of electricity to the appellant's premises and the appellant was required to pay RM637,697.62 being the amount which should have been paid between October 2006 and July 2008 (22 months) had the supply been correctly recorded.

[6] The appellant refused to settle the payment of RM637,697.62 being the loss of revenue to the respondent and costs of electricity usage that had not been recorded in the meter reading from September 2006–July 2008. Arising from this, the respondent filed the civil suit against the appellant in the High Court to recover this loss of revenue.

THE APPELLANT'S/DEFENDANT'S DEFENCE

[7] The appellant mounted a vigorous defence denying the respondent had a right to demand for payment of the RM637,697.62 on a number grounds which can be summarised as follows:

(a) the respondent/plaintiff was estopped from making the claim because it had care and custody of the TNB meter room which was kept under lock and key by its employee and if there were any inaccuracies in the meter readings, these would have been capable of detection during their monthly visits to issue the electricity bills and during its annual shutdown to carry out maintenance work, and by the absence of any complaint during this period the respondent had acknowledged that the meter was not faulty (para (2.3), defence);

(b) the appellant/defendant had not been charged for any offence under the Electricity Supply Act 1990 which was a pre-condition to the respondent's right to claim the sum of RM637,697.62 (para (3.1), defence);

(c) the appellant also questioned the method of calculation as unreasonable, arguing that the back billing had to be based on the actual number of days which showed an undercharge and not on the basis of every day of electricity consumption from 1 October 2006–1 July 2008;

(d) alternatively, the appellant's claim on the alleged meter inaccuracy could not exceed loss for three months from the date the appellant was informed of the purported undercharge (para (15), defence); and

(e) the respondent's threats to disconnect the electricity supply to the hotel were issued with mala fides, not in accordance with the Electricity Supply Act 1990, and amounted to an extortion caused by the oppressive use of the respondent's authoritative position (paras (8), (12), and (12.1), defence).

COUNTERCLAIM FOR DEFAMATION

[8] The appellant filed a counterclaim against the respondent seeking a declaration that the respondent has no right to claim for the sum of RM637,697.62 and damages for defamation arising from the several letters that the respondent had sent to the appellant in the course of the threat to

discontinue the supply of electricity and the demand that the appellant settle the sum claimed for the 22 months of alleged underbilling. In its counterclaim, the appellant averred that the respondent 'published the ... words maliciously in that it knew they were false, [or] alternatively was reckless whether they were true or false, and intended thereby to injure the defendant in its said business' (para [13]).

[9] In particular, the appellant referred to the 'Notis Pemotongan Bekalan Elektrik Di Bawah Subseksyen 38(1) Akta Bekalan Elektrik 1990' dated 13 February 2009 which stated offences had been committed under s 37(1), (3) and (14) of that Act in the following terms:

> Sila ambil perhatian bahawa pada 17.07.2008 15:40:00 satu pemeriksaan telah dilakukan terhadap pepasangan kami di premis tuan. Hasil pemeriksaan kami, kami mendapati bahawa pepasangan tersebut telah diusik atau diubahsuai dalam keadaan yang dinyatakan berikut di bawah:
>
> ...
>
> Berdasarkan keterangan di atas, pihak kami berpendapat suatu kesalahan telah dilakukan di bawah Akta Bekalan Elektrik 1990 ('Akta') seperti berikut:
>
> ...
>
> Sila ambil perhatian bahawa di bawah subseksyen 38(1) Akta, tuan adalah diberi notis bahawa bekalan premis di atas akan dipotong pada 04.03.2009 ...

THE HIGH COURT DECISION

[10] The learned High Court judge allowed the respondent's claim but dismissed the appellant's counterclaim with costs of RM50,000 awarded to the respondent.

[11] In summary, the High Court judge found there was sufficient evidence to show tampering, as evidenced by:

(a) the evidence of PW2 and PW3 who established that the stickers placed on the 'carrier fuse', whose function was to prevent the meter from tampering, was torn;

(b) PW2 also found that the seal bits (exhs P2A, P2B, P2C, P2D and P2E) were fake items and not the original seal bits used by the respondent; and

(c) the respondent's witnesses also testified that the wiring on the circuit had been disturbed and the circuit of the red phase on the main meter and the inspection meter was blown.

[12] The graph produced at trial (exh P3), derived from the remote monitoring system, clearly showed a disturbed pattern of electricity

consumption from 9 August 2006–17 July 2008 which could only be attributed to meter tampering. Although the electricity sub-station was under the care and control of the respondent, it did not mean that nobody could not have physical access to it, since it was not guarded 24 hours a day. The learned judge stated in the judgment:

> The fact that the sub-station is under the care and control of the plaintiff does not mean that nobody can physically have access to it. The sub-station is within the hotel premise, and was not guarded 24 hours. The tampering could happen and it did happen in this case. Bearing in mind that there are millions of sub-stations out there, it is quite impossible for the plaintiff to ensure that nobody can have access to the sub-station and tamper with the same. In any event, the tampering does not benefit any third party, only the user (at pp 11–12 of the judgment).

[13] The learned trial judge observed that the written submission of the appellant was more concerned with the calculation of the loss of revenue than the issue of tampering, on the argument that the back billing must be done on the basis of the actual days of tampering and on the entire number of days from 1 October 2006–1 July 2008. The High Court held this was not a pleaded issue and the calculation was not unreasonable, since billing was done on a monthly, not a daily basis. The High Court held:

> The unreasonableness of the back billing is not a pleaded issue. In any event, having considered the same, I am of the considered opinion that the calculation is not unreasonable. The billing for electric consumption is based on monthly reading, not daily reading. As such, I am of the considered opinion that it is not unreasonable that the calculation is also premised on the monthly consumption. Further, if the miscalculation is also premised on the mistakes of the plaintiff, I would agree that the calculation must be precise, and that the plaintiff cannot enrich itself at the expense of the public. But what we have here are acts of tampering, and the beneficiary of the reduced electric charges happens to be the defendant. In such a situation, the back billing premised on monthly consumption is not unreasonable (at p 15 of the judgment).

[14] Addressing the delay and failure on the respondent's part to take immediate action, the High Court was of the opinion that although the tampering was first discovered during a routine inspection on 13 September 2007, it had to place the hotel under close scrutiny through the remote monitoring system until the raid on 17 July 2008, stating:

> I do not find the same to be unreasonable as the plaintiff requires time to do an effective monitoring, bearing in mind that there are millions of consumers out there.

[15] As regards the argument that the back billing could only be for a maximum of three months as allegedly provided under reg 11(2) of the Supply Regulations 1990 , the High Court held that this provision did not apply in the

context of tampering and a claim for loss of revenue. It applied in relation to meter inaccuracy, meter malfunction, incorrect meter reading, incorrect application of meter multiplier, cross connection or faulty installation, ie it related to 'acts of negligence' on the part of the plaintiff which led to an undercharging or overcharging.

[16] On the issue whether a criminal prosecution and conviction for offence under s 37 of the Electricity Supply Act 1990 was a condition precedent to a civil suit being filed for recovery of loss revenue by the respondent under s 38, the High Court, in rejecting this argument, referred to and applied the decision in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892 which held that it was not a condition precedent. The High Court noted the rationale in *Claybricks & Tiles*, which it was stated, '... s 38(1) Akta tersebut telah diperuntukkan secara spesifik untuk menjaga kepentingan TNB dan membolehkan TNB bertindak cepat dan dengan itu dapat mencegah penyalahgunaan seperti pencurian bekalan elektrik yang dibekalkan oleh TNB'. The High Court in this instant appeal held:

> There is no necessity for a person to be convicted of an offence in s 37 before a civil suit can be initiated. The criminal prosecution is distinct from the civil suit, and bearing in mind that the plaintiff is also a commercial entity, its pursuit in cases of this nature in seeking loss of revenue must not be hampered by criminal prosecution. Act 447 has clearly provided a few options for the plaintiff to act, either by criminal prosecution, civil suits to recover loss of revenue or, in urgent situations, to disconnect the supply of electricity under s 38(1). So long as the plaintiff can prove that there are acts of tampering, the plaintiff may pursue a civil suit to recover the losses. In any event, it is the defendant, and no other third party who is the beneficiary of the said under charges (at p 13 of the judgment).

[17] The appellant had tried to explain the discrepancies in the consumption of electricity were connected with low room occupancy during those periods, but the High Court explained that no supporting data was presented to the court and on the evidence the consumption of electricity had remained constant after the raid.

[18] With reference to the counterclaim, the High Court held 'breach of statutory duty' was not pleaded, and as for the counterclaim for defamation, the three notices said to contain alleged defamatory words were merely letters of demand for payment of the loss of revenue following the tampering of the meter and the respondent had the statutory right to pursue the civil suit to recover its losses. The letters themselves merely indicated the acts of tampering but did not directly accuse the appellant of the tampering. In particular, the respondent's letter dated 3 April 2009 was quoted by the learned High Court judge. These were the relevant paragraphs emphasised in the judgment:

> 3. TNB mempunyai bukti yang kukuh bahawa pepasangan TNB telah diusik.

> Kejanggalan pengusikan meter telah dikenalpasti ialah litar voltan merah telah diganggu menyebabkan flus merah bagi jangka utama dan semak putus. Didapati juga pendawaian bagi litar voltan telah diganggu dan tidak berada seperti dikehendaki. Pihak kami juga telah memberi penerangan kepada tuan iaitu En Azman sewaktu pemeriksaan dijalankan di premis.
>
> 4. *Pihak kami tidak menuduh mana-mana pihak tentanp kejanggalan meter tersebut. Pihak kami cuma ingin menuntut balik hasil kerugian penggunaan elektrik kwh sahaja*. Pihak tuan adalah dinasihatkan supaya menjelaskan tuntutan kami sebanyak RM637,697.62 yang masih tertunggak. Tempoh back billing adalah berdasarkan pada rekod daily load profile dari bulan Oktober 2006 sehingga bulan Julai 2008 (Emphasis added.)

OUR DECISION AND REASONS

[19] We heard the appeal on 8 October 2013. We unanimously allowed the appeal on the main claim for loss of revenue but dismissed the appeal on the counterclaim, with cost of RM60,000 here and below awarded to the appellant. Our full reasons for the unanimous decision are elaborated below.

[20] At the outset, we wish to state that as far as the counterclaim was concerned, we were in complete agreement with the findings and conclusions of the High Court. The evidence and the applicable law did not support a claim for breach of statutory duty or defamation, quite aside from the argument that breach of statutory duty was not pleaded. We agreed with the position taken by the High Court that the respondent was merely exercising its powers under s 38 of the Electricity Supply Act 1990 in a situation where there was evidence of tampering of the TNB meter. In such circumstances, how could the court infer any mala fide act that was extortionate or oppressive on the part of the respondent? On the claim for defamation, the approach to the construction of words alleged to be defamatory has been clearly laid down in *Tun Datuk Patinggi Haji Abdul-Rahman Ya' Kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393, and this case was in fact cited by counsel for the appellant, in these terms:

> The approach in the construction of the words complained of is to consider the meaning such words would convey to ordinary reasonable persons using their general knowledge and common sense; it is not confined to strict literal meaning of the words but extends to any reference or implication from which persons can reasonably draw.

[21] The 'ordinary reasonable person' will not draw the same inferences from the words used in the relevant letters of the respondent which were in essence demand letters in pursuit of a legal right, and therefore could not be defamatory. The position taken by the respondent was not so much that the appellant was the culprit who tampered with the meter, but more on the basis that in such circumstances it was entitled statutorily to claim for loss of revenue

in its capacity as a utility company since the tampering benefited the appellant. We have emphasised earlier in this judgment the explanation afforded by the respondent, and we repeat the words used: 'Pihak kami tidak menuduh mana-mana pihak tentang kejanggalan meter tersebut. Pihak kami cuma ingin menuntut balik hasil kerugian penggunaan elektrik kwh sahaja'.

Issue of a criminal conviction being a pre condition

[22] Turning now to the main appeal on the issues raised in this connection, we were not persuaded by the appellant's argument in relation to a prosecution and conviction for a criminal offence being a pre condition for a civil action for recovery of loss of revenue under s 38(3) of the Electricity Supply Act, which reads:

> (3) The licensee may require the consumer to pay him for the loss of revenue *due to the offence committed* under s 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply (Emphasis added.)

The statutory formula in sub-s (3) has been contrasted with that in sub-s (1), dealing with disconnection of electricity supply, which reads:

> (1) Where any person employed by a licensee finds upon any premises evidence *which in his opinion proves that an offence has been committed* under section 37(1), 37(3), or 37(14), the licensee or any person duly authorized by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the premises (Emphasis added.)

Sub-section (1) refers to 'evidence' which in the 'opinion' of a person employed by the licensee 'proves that an offence has been committed' under any of the various sections under s 37, as opposed to the more positive 'due to the offence committed' in sub-s (3) of s 38. It has therefore been argued in a line of High Court cases (*Tenaga Nasional Bhd v Takatronics (M) Sdn Bhd & Ors* [2010] MLJU 1727; [2010] 1 LNS 1559; *Tenaga Nasional Bhd v JCY HDD Technology Sdn Bhd* [2012] 3 MLJ 705; [2012] 3 AMR 576; and *Tenaga Nasional Bhd v EE-Lian Plastic Industries (M) Sdn Bhd* [2013] 8 MLJ 683; [2013] 2 CLJ 697) that a prior prosecution and conviction is required before a claim for loss of revenue under s 38(3) is commenced, unlike an act to disconnect an electricity supply to premises which requires only the formation of an 'opinion' that an offence has been committed.

[23] With respect, this line of case authorities must be read in the light of the Federal Court decision in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296 and the Court of Appeal decision in *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892. The Federal Court approved the reasoning of the Court of Appeal in *Claybricks*, in

the following terms:

> [7] At the Court of Appeal the appellant's appeal was dismissed on the ground that the relationship between the appellant and the respondent was purely commercial or contractual. As the relationship came within an environment regulated by private law it was not open to the appellant to challenge the respondent's decision by judicial review, which was a public law remedy. In dismissing the appellant's appeal, the Court of Appeal relied on *Claybricks & Tiles Sdn Bhd lwn Tenaga Nasional Bhd* [2007] 1 MLJ 217; [2006] 4 CLJ 892. This case relates to an Erinford injunction application to prevent the TNB from disconnecting the supply of electricity to the plaintiff's premises. Zulkefli Ahmad Makinudin JCA (as he was then) when dismissing the appeal remarked:
>
> > TNB's s 38 notice to disconnect the electricity supply for offences enumerated in s 7 need not prove the offence in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather than TNB's obligation under public law.
>
> [8] Zulkefli Ahmad Makinudin JCA also elaborated that s 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.

[24] In our view, the underlying reasoning of allowing TNB's interest to be preserved expeditiously, would equally apply under s 38(1) as well as s 38(3). This conclusion will accord with a harmonious and purposive reading of the subsections in s 38.

Recent decision of Court of Appeal on loss of revenue claim

[25] Subsequent cases by this court have also followed the reasoning in *Claybricks* and *WRP Asia Pacific Sdn Bhd*. We refer here to two decisions of this court in *Ichi-Ban Plastic (M) Sdn Bhd v Tenaga Nasional Bhd* [2014] 6 MLJ 461 and *Sumbang Projeks Sdn Bhd v Tenaga Nasional Bhd* [2014] 4 CLJ 323. In *Ichi-Ban Plastic*, for example, the Court of Appeal said:

> ... we were of the view that given the Federal Court decision in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd*, the legal position was clear. Although this Federal Court case concerned an issue of disconnection of electricity supply and in the context of a judicial review application, the same principles should apply, in our view, to a case involving a claim for loss of revenue under s 38(3). There is no legal requirement for there to be a prosecution and conviction first before a claim for loss of revenue is pursued. To this extent, we were in agreement with the finding of the learned trial judge, and disagreed with the other line of cases which required a prior prosecution and conviction, such as *Tenaga Nasional Berhad v Takatronics(M) Sdn Bhd* [2010]

MLJU 1727; [2010] 1 LNS 1559 and *Tenaga Nasional Bhd v Ee-Lian Plastic Industries (M) Sdn Bhd* [2013] 8 MLJ 683; [2013] 2 CLJ 697.

[26] Having concluded that a prior prosecution and conviction under s 37 is not a precondition to a loss of revenue claim under s 38, it becomes necessary to determine whether the respondent has proven its claim on the civil burden and standard of proof of balance of probabilities. First of all, there has to be sufficient credible evidence of the commission of any of the offences under s 37. This is not something that can be conveniently assumed in the absence of convincing evidence where the burden of proof on the civil standard lies on the plaintiff. There must be evidence of tampering to serve as a foundation of the loss of revenue claim. The second issue that immediately intrudes is: who tampered with the meter installation? On the facts of this appeal, did the evidence point to the offence being committed by the appellant, or some other person? If the tampering was done by a third party, can the appellant be held fully accountable just on the basis that the appellant has reaped a benefit from it as against loss suffered by the respondent? Thirdly, if tampering is proven, whether by the owner of the premises or a third party has the calculation of losses been properly done? In other words, has the quantum of losses been established and proven on a balance of probabilities?

OUR EVALUATION OF THE EVIDENCE

[27] Upon considering the evidence in detail, we found several unsatisfactory aspects in the decision of the High Court, indicative of a failure of the trial court to conduct a proper judicial evaluation and appreciation of the evidence. For a start, there was a suggestion in the judgment to indicate that the appellant through one of its witnesses, DW2 (Azman bin Yusof), had agreed that there was tampering. See para (v) on p 11 of the judgment: 'The physical evidence above is supported by the evidence of DW2, who agreed with the suggestion by plaintiff's counsel that there was in fact tampering of the meter at the hotel'. This conclusion is not borne out by the actual testimony of DW2, which we quote below:

Q: Semasa fius dan sil ditanggal kamu ada bersama-sama masa itu?

A: Setuju.

Q: Adakah kamu bersama-sama pegawai TNB semasa keseluruhan waktu pemeriksaan dibuat, setuju atau tidak?

A: Saya rasa just 10 minit, bukan kesemua sampai siap lock pintu ...

Q: Masa operasi tanggal kamu adalah?

A: Saya di situ. Pegawai TNB ada menghubung saya dan membawa saya di situ.

Q: Pegawai TNB ada maklumkan bahawa fius putus, sil palsu, ya?

A: Ya, betul.

Q: Saya cadangkan bahawa kamu bersetuju atau tidak ini adalah membuktikan tampering meter, setuju atau tidak? Meter yang diusik?

A: Pasal saya tak tau keadaan dia.

Q: Setuju atau tidak dengan dokumen ini kamu ada di sini, saya cadangkan bahawa kamu bersetuju bahawa meter telah diusik?

A: Itu saya setuju.

It can be seen from the exchange between counsel and the witness that the answers given by DW2 were very guarded and the allegation that he agreed there was tampering must be viewed in its total context. The questions and answers were specifically in relation to a document produced by the respondent which this witness acknowledged. Nevertheless, the evidence indicated that the TNB meter room was just outside the hotel's main building (next to the lobby area) and it was kept under lock and key, with the key for access being kept by the respondent. See the evidence of PW1 (Mohamad Fardi bin Seliman):

Q: Sahkan kepada Mahkamah bahawa pencawang ini adalah di bawah jagaan dan kawalan TNB?

A: Ya.

Q: Mangga dan kunci untuk masuk ke dalam substation dipegang oleh TNB, benar?

A: Benar.

It was not established on the evidence that any of the employees of the hotel had access, or could have had access, to the meter room. DW1 (Khoo Chai Kaa), the managing director of the appellant, testified on this issue of access, and we quote the relevant part of this testimony:

Q: What was Nikmat Maju's response to TNB's accusation?

A: I asked for a meeting with TNB. The meeting was on 26th February 2009. At the meeting, the TNB officers accused Nikmat Maju of disturbing and vandalising the TNB supply. I made it clear that we strongly disagreed with their statement. I said it was impossible because the TNB sub-station at the Hotel is fully under TNB control and that we do not have the keys to unlock the TNB sub-station; and that the hotel management and all our department heads are not allowed to enter the TNB sub-station. I asked TNB for solid evidence. I said I needed the evidence so that we can act against the person concerned if the accusations were true.

Q: What did you say about TNB's threat to cut off the electricity?

A: I said TNB cannot threaten to cut off the electricity when we have paid all TNB bills promptly and that TNB was putting Nikmat Maju in a difficult position by forcing Nikmat Maju to pay such a huge amount to have electricity for our hotel. I said the accusation of violating the Act was a baseless accusation. I said it was made without proof and also that the back billing did not indicate the period for such loss. We gave them documents to show that the TNB bills issued were in proportion with the hotel's occupancy and revenue. I wrote a letter to confirm Nikmat Maju's stand. (at pp 72–73, rekod rayuan tambahan (No 2))

[28] These were the unchallenged facts in this appeal:

(a) the hotel had never failed to settle its electricity bills promptly;

(b) the meter room/sub-station was under lock and key which were kept by the respondent;

(c) when the raid was done, it was the respondent's representatives who unlocked the sub-station and meter room, not DW2;

(d) the raid was conducted after a prolonged period of remote monitoring of over a year which showed discrepancies in electricity consumption;

(e) the discrepancies occurred over a span of several days in a month with the remaining days showing normal readings;

(f) at no point of time before the raid did the respondent inform the appellant of any of the discrepancies whereas the respondent could have done so, particularly when there was a yearly maintenance inspection conducted in between the period;

(g) the respondent calculated the alleged loss based on the discrepancy of an under-recording or an error rate of -332.44% as against the actual usage of electricity by the hotel on an overall monthly billing, not on the basis of the actual days of loss; and

(h) it was the clear and express position of the respondent that it did not accuse the appellant directly of any offence as stated in its letter quoted earlier in this judgment: 'Pihak kami tidak menuduh mana-mana pihak tentang kejanggalan meter tersebut. Pihak kami cuma ingin menuntut balik hasil kerugian penggunaan elektrik kwh sahaja'. (Indeed, this was partly the reason why the High Court found there could not have been any basis for defamation in the letters of demand).

[29] With respect, in these circumstances we found that the High Court judge, in accepting that the law did not require a prior prosecution and conviction to be had before a civil claim for loss of revenue under s 38(3) to be brought, failed to properly direct Her Ladyship's mind further to consider that

the respondent must still prove the commission of a s 37 offence by some party, and further to properly consider whether, where the tampering was done by a third party and not the appellant, what was exactly the loss suffered by the respondent and the gain enjoyed by the appellant. The evidence by the respondent's witnesses acknowledged that it was possible to calculate on basis of the exact days when the remote monitoring showed discrepancies and to exclude days when it showed normal readings. The trial judge too seemed to accept that technically it could be done, as shown in the passage in the judgment which has been cited earlier, reading:

> As such, I am of the considered opinion that it is not unreasonable that the calculation is also premised on the monthly consumption. *Further, if the miscalculation is also premised on the mistakes of the plaintiff, I would agree that the calculation must be precise, and that the plaintiff cannot enrich itself at the expense of the public.* (Emphasis added.)

[30] In the precise circumstances of this appeal, it looked patently unfair to bill the undercharged consumption on a monthly basis and not actual days for 22 months to arrive at the huge figure of RM637,697.62. Most businesses will be crippled by this sort of calculation, which, with respect and contrary to the trial judge's finding, on any proper evaluation of the facts must be regarded as an unreasonable calculation of the quantum of damages. In other words, the respondent has not proven its quantum of damages on a balance of probabilities. To allow the respondent to recover on the basis of their calculation will be to treat the alleged commission of a s 37 offence as effectively an offence of strict liability with resultant punitive damages as compensation for the alleged loss of revenue, although the tampering was done by a third party.

[31] We provide below some excerpts from the evidence of the respondent's witnesses which proved how remote monitoring could be accurately done, the fact that there were discrepancies for only a few days in a month and how they responded to counsel's cross-examination that their method of calculation was unreasonable.

(a) PW3 (Chandran a/l Raman)

Q: Sebentar tadi anda ada memberitahu berkenaan pemantauan secara remote, boleh anda jelaskan?

A: Boleh. Sebenarnya, saya ada menulis/menyediakan kronologi peristiwa kes ini ... *Saya telah memantau secara remote iaitu melalui pemantauan dengan menggunakan meter software pada premis Defendan. Apabila saya membuat semakan terhadap penggunaan elektrik di premis defendan. terdapat keianggalan ke atas kadar penggunaan sebelum serbuan berlaku di mana kadar penurunan tidak berterusan seperti yang sepatutnya sekiranya fius putus*. Saya terus

memantau melalui 'remote monitoring' dan pada hah serbuan terdapat penurunan yang mendadak. Oleh itu, pihak plaintif telah membuat keputusan untuk melakukan serbuan.

Q: Bagaimana anda melakukan semakan?

A: Saya telah menyemak penggunaan elektrik sebelum pemeriksaan dibuat, dan terdapat kadar turun naik yang tidak munasabah ... Ini adalah geraf penggunaan elektrik di premis Defendan yang disediakan oleh saya dengan memuaturunnya daripada sistem kami. Jika diteliti terdapat kadar turun naik yang tidak munasabah. Selalunya, sekiranya tiada kejanggalan pada sistem perjangkaan biasanya 'pattern' geraf 'load profile' konsisten berbanding dengan jika ada kejanggalan. Contohnya, semasa fius putus 'pattern' atau 'load profile' akan berubah di mana bacaan penggunaan yang direkodkan dijangka berkurang secara terus menerus daripada penggunaan sebenar pengguna. *Semasa membuat analisa 'load profile' didapati penurunan bacaan pengguna semasa fius putus adalah beberapa hari sahala dalam sebulan dan berulang setiap bulan*. Ini tidak sepatutnya berlaku, apabila fius putus bacaan 'load profile' akan terus berkurang dan mendatar dan bacaan tidak akan naik dengan sendirinya tanpa pembetulan oleh pihak plaintif. Ini menimbulkan keraguan kepada pihak kami dan ini menyebabkan pihak kami mengsyaki terdapat pengusikan pada sistem perjangkaan. *Jadi berdasarkan geraf ini, ia adalah bukti yang agak kukuh pengusikan telah dibuat ke atas pepasangan meter tersebut* (pp 29–30, RRT2).

Q: *Di dalam keteranaan kamu di soalan No 11 penvata saksi kamu, kamu berkata bahawa penurunan bacaan pengguna adalah untuk beberapa hari saia dalam sebulan dan berulang setiap bulan. Adakah serbuan dibuat pada hari bila kamu mendakwa penurunan bacaan pengguna berlaku?*

A: *Ya.* (p 35, RRT2)

Q: Bagaimana graf ini dibuat?

A: *Sebenarnya meter TNB akan merekodkan bacaan setiap 30 minit dan setiap 30 minit ini dia akan ada consumption kwh. These kwh kalau kita refer pada graf ini adalah bacaan setiap 30 minit. So. daripada bacaan vang terdapat dalam meter, kita akan extract this data in our system, we call remote meter readings. So, kita ada data centre. Dia akan semua simpan data-data ini dalam kita punya server. Sebenarnva saya dah download data-data ini dan simpan dalam format graf untuk mengenalpasti sejak bila terdapat gangguan pada premis ini.* (p 36, RRT2)

Q: Apakah yang dikatakan 'remote'?

A: 'Remote meter reading' adalah pengambilan secara automatic.

Q: That means?

A: That means for example, masa dulu hujung bulan technician TNB akan pergi ke tapak untuk mengambil reading pada hujung bulan. Tapi pada masa sekarang dengan adanya teknologi remote meter reading ini data-data itu akan ditarik secara automatic. That means menggunakan communications something like sms. So, hujung bulan pada 1 hb jam 00 kita akan hantar signal ke meter tersebut dan dia akan hantar data.

...

Q: Adakah pihak TNB membuat pemeriksaan rutin kepada pencawang pada masa ke semasa?

A: Saya tak pasti, tapi biasanya kita akan buat pemeriksaan setahun sekali.

Q: *Adakah satu pemeriksaan rutin pada 13.09.2007?*

A: *Pada 13.09.2007. sava telah mengarahkan juruteknik sava untuk mengganti meter semak dan membuat pemeriksaan.*

Q: *Adakah selepas pemeriksaan tersebut kamu melaporkan dalam rekod kamu bahawa sistem penjangkaan berada dalam keadaan yang baik?*

A: *Saya melaporkan sistem penjangkaan berada dalam keadaan baik selepas tindakan pembetulan telah diambil.* (pp 36–37, RRT2)

Q: *Adakah kamu membincang perkara kadar turun naik ini dengan defendan sepanjang pemantauan dibuat like you said untuk 2 tahun sebelum serbuan?*

A: *Tidak.* (p 38, RRT2)

Q: Dalam kes ini saya ada tanya kepada saksi kedua. Saya mengatakan memandangkan bahawa TNB tidak ada niat untuk membuktikan gangguan yang didakwa dilakukan atau bahawa kesalahan dilakukan oleh defendan beritahu Mahkamah mengapa pasukan TNB menunggu selama 1 tahun lebih sebelum bertindak dan kemudian membuat tuntutan back billing selama 22 bulan?

A: Sebenarnya bila kami dah jumpa problem ini kita dah melaporkan pada pihak HD/suruhanjaya tenaga. So, almost 1 year kita tunggu jawapan daripada mereka. (p 40, RRT2)

(b) PW4 (Nur Dayana bt Shaharudin)

Q: Bagaimanakah jumlah tersebut dapat dicapai?

A: Jumlah RM637,697.62 tersebut dicapai dari penurunan ketara penggunaan elektrik iaitu dari 01.09.2006 hingga 01.07.2008 iaitu berdasarkan kepada ralat -32.44%.

Q: Bagaimanakah pengiraan tersebut dilakukan?

A: *Pengiraan dibuat berdasarkan apa yana tercatit dalam Ulasan Teknikal bertarikh 21.07.2008 dan di dalam Borang Pemeriksaan LPC di mana*

di dalam Laporan tercatat ralat sebanyak -32.44%. Di mana kegagalan meter elektrik TNB untuk membuat bacaan sebanyak -32.44%. Kegagalan ini merupakan satu kerugian kepada Plaintif. Untuk mendapatkan kembali kerugian ini perbezaan unit kwh didarabkan dengan tariff elektrik Plaintif.

...

Q: *Saksi TNB yang ke-3 En. Chandran dalam penyata saksinva mendakwa bahawa terdapat kejanggalan penggunaan elektrik di premis defendan dan bahawa pada hari serbuan dibuat pada 17.07.2008 terdapat kejanggalan yang ketara sebanyak -32.44% dan bahawa penurunan bacaan pengguna adalah untuk beberapa hari saia dalam sebulan dan berulang setiap bulan.*

Saya cadangkan kepada anda bahawa ia adalah sangat tidak munasabah untuk TNB mengenakan caj billing kepada pengguna pada kadar ralat tersebut untuk tempoh 22 bulan, apabila ralat ketara itu berlaku hanya untuk beberapa hari dalam setiap bulan, setuju?

A: *Saya hanya menyemak berdasarkan laporan daripada pihak teknikal.* (p 63, RRT2).

...

Q: *Kalau menggunakan graf boleh tahu exactly berapa hari penggunaan yang ralat itu berlaku dan mengeluarkan bil untuk hari itu saja. la boleh dibuatkan?*

A: *Tidak pasti.*

Q: *Keterangan adalah bahawa kadar turun naik berlaku untuk beberapa hari saia dalam sebulan. Ini bermakna pada lain hari tidak ada masalah, setuju?*

A: *Setuju.* (p 64, RRT2)

[32] The testimony of the two important witnesses of the respondent confirmed the following crucial facts:

(a) the respondent had control and custody of the sub-station;

(b) the respondent had a reliable remote monitoring system which sent automatic readings from the substation to its data centre's server from which discrepancies could be monitored and calculated;

(c) the data confirmed that the discrepancies occurred for only several days in a month over the span of 22 months;

(d) the billing based on the error of -32.44% was not done on the basis on the number of days affected but on the basis of a straightforward multiplying of the error rate with the tariff rate on a monthly basis;

(e) the respondent knew of the discrepancies throughout the period but did not act promptly because it had waited for a response from the Suruhanjaya Tenaga for a period of one year and the Suruhajaya Tenaga had not responded; and

(f) routine inspection work at the substation was done on 13 September 2007 and the metering system was reported to be in good working condition (the back billing was projected backwards to 1 September 2006, a date before this routine inspection).

OUR FINDINGS

[33] When all the evidence presented before the High Court was considered, and the evidence of both parties given proper and fair consideration, and balancing and testing the oral testimonies with the documents and the probabilities of the case, we were of the opinion that the findings of the High Court could not be supported. In the circumstances elaborated above, we believed there was sufficient evidence on which to raise an estoppel. The appellant was led to believe over that lengthy period of 22 months that everything was in order only to be later billed for more than half a million Ringgit for the alleged under billing. The respondent, by its own admission, had a sophisticated system of remote monitoring and yet it chose not to act promptly and remedy the alleged defects in the metering system. It is no answer to place the blame on the Suruhanjaya Tenaga for the delay for the simple reason that it would be unfair to impose liability on the customer by reason of the respondent's own lack of sense of immediacy. Why should it wait so long and yet be heard to complain that it was losing revenue? All said, the method of calculating the back billing was erroneous since the same sophisticated monitoring system could calculate the exact loss of revenue on a daily basis, and it was admitted by the respondent's witnesses that the discrepancies occurred for only several days in a month. Reference was made by the High Court to the presumption under s 38(4) of the Electricity Supply Act 1990 whereby a written statement by an employee of the respondent specifying the amount of the loss of revenue and the person liable for the payment 'shall be prima facie evidence' of the payment due, but on the evidence this presumption, in our opinion, was easily displaced.

[34] The judgment of the High Court also rejected the argument on the unreasonableness of the calculation partly because it was not expressly pleaded. We have looked at the notes of evidence in some detail, but it did not appear any objection on this score was raised when the witnesses were being cross-examined on this issue. In any event, the justice of the case should be a countervailing factor particularly when the High Court itself dealt with issue in some detail only to reject the argument ultimately. There was no element of

surprise or unfairness occasioned to the respondent by the inclusion of this additional ground.

CONCLUSION AND ORDERS

[35] In conclusion, we were therefore of the opinion there were serious appealable errors on the appreciation of the evidence and the finding on the estoppel argument that required intervention on our part. Consequently, we allowed the appellant's appeal against the decision of the High Court in allowing the claim of the plaintiff. The judgment of the High Court on the plaintiff's claim was set aside.

We dismissed the appellant's appeal on the counterclaim.

In these circumstances, we ordered costs of RM60,000 here and below to be paid by the respondent to the appellant.

The deposit was ordered to be refunded to the appellant.

Appeal on the main claim allowed and appeal on the counterclaim dismissed with costs

Reported by Kanesh Sundrum